IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.496 OF 1995

Bhai @ Dinesh Anant Bhatkar]
Aged about 26 years]
residing at Pundalik Smriti]
1/10, Chheda Road,Dombivali (E)]
Dist.Thane]..Appellant
(Ori.Accused)

Versus

State of Maharashtra]..Respondent
(Ori.Complainant)

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Mr.B.G.Tangsali Advocate for the appellant
Mr.A.S.Shitole, A.P.P. for Respondent

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CORAM: SMT.V.K.TAHILRAMANI,J.

DATE : NOVEMBER 23,2004

ORAL JUDGMENT:

1. Through this appeal, the appellant challenges the judgment and order dated 27th July, 1995 passed by the learned IInd Additional Sessions Judge, Thane in Sessions Case No.324 of 1993. By the said judgment and order, the appellant has been convicted for the offence under Section 376 read with Section 511 of IPC and sentenced to undergo R.I. for three years and to pay a fine of Rs.1,000/- indefault to

suffer R.I. for nine months.

2. Briefly stated the prosecution case is as under:

. P.W.2 Shivaji Khairnar along with his family was residing in Ganesh Apartment, Chheda Road, Dombivali (E). The family of Shivaji Khairnar consists of his wife, minor daughter Monika aged 7 years and minor son Atul aged 5 years. Pundlik Smriti Apartment was adjacent to Ganesh Apartment. The accused was residing there with his parents. On 4.2.1993, Atul was playing a ball which fell down from the gallery of their flat. The ball fell in the compound of Pundlik Smriti Apartment. Monika went down to fetch the ball. When she entered in the compound of Pundalik Smriti Apartment, she found that the boys who were playing on the terrace in the said Apartment, had taken away ball of her brother. While she was going up, the accused who was standing outside his flat, asked her where she was going. Monika told him that she was going to terrace to bring the ball of her brother. At that time, the accused told her that he would give back the ball and he went towards terrace. However, when they came near the terrace, the appellant put latch of the door of the terrace from outside. Thereafter, the accused took down underwear of Monika half way.

He opened zip of his pant and brushed his private part against her private part. Thereafter, the accused opened the door of the terrace. He threatened the boys and asked them to return the ball. Accordingly, those boys returned the ball. While returning, the accused told Monika not to disclose the incident to anyone. However, on returning home, Monika told the incident to her parents. Thereafter, complaint of Monika came to be recorded. After completion of investigation, the charge sheet came to be filed.

3. In due course the case came to be committed to the Court of Sessions for trial. The charge came to be framed against the appellant-accused for the offence under Section 376(2)(f) of IPC. The accused pleaded not guilty and claimed to be tried. It is the defence of the accused that he was falsely implicated in the said case as P.W.2 Shivaji Khairnar the father of Monika had demanded some money from the accused and his father. As the money was not given, a false case was filed against him.

4. In order to bring home the guilt to the accused, the prosecution has examined six witnesses. On going through the evidence of these witnesses, the learned Sessions Judge convicted and sentenced the

appellant as stated in para no.1 above. Hence, this appeal.

5. I have heard Mr.B.G.Tangsali, the learned advocate for the appellant and Mr.A.S.Shitole, the learned A.P.P. for the State. I have also perused the entire material on record.

6. The star witness in the present case is P.W.1 Monika Shivaji Khairnar. As the prosecution story in para no.2 above has been taken from the examination in chief of Monika, I do not find it necessary to repeat the evidence of Monika. P.W.1 Monika has clearly implicated the appellant and she has stated the act done by the appellant. Nothing has been elicited in the cross examination of Monika so as to disbelieve her testimony. The evidence of the prosecutrix Monika is supported by the evidence of P.W.2 Shivaji Khairnar i.e. father of Monika. Shivaji Khairnar has stated that on the date of incident, Monika came home and disclosed the incident to her parents. So also, the evidence of Monika receives some support from the evidence of P.W.3 Ulkesh Mane who was one of the boys playing on the terrace of Pundalik Smriti Apartment. He has stated that on the date of the incident, they were playing on the terrace of the building. Their ball

fell down. His friend went down to bring ball and returned with two balls. They resumed playing cricket. Then Monika came with accused there. The evidence of P.W.3 Ulkesh establishes the presence of the accused and Monika at the scene of incident at the relevant time. Nothing has been elicited in the cross-examination of any of these witnesses so as to disbelieve their testimony.

7. Shri.Tangsali, the learned advocate for the appellant has submitted that the offence committed by the appellant would not fall under the purview of Section 376 read with Section 511 of IPC but at the most, it would fall under Section 354 of IPC. In this connection, he drew my attention to the evidence of P.W.5 Dr.Kiran Ubale who had examined Monika. Dr.Ubale has stated that there were no external or internal injuries and there was no evidence of defence injuries. From the medical evidence as well as the evidence of P.W.1 Monika, it does not appear that this is a case of attempt to commit rape but it appears to be a case under Section 354 of IPC. From the evidence on record, it does not appear that the accused intended to commit rape. If the accused wanted to commit rape, there was nothing to stop him doing so. It is to be noted that after brushing his private part against the

private part of Monika, thereafter he had stopped and he has opened the terrace door. In my opinion, looking to the evidence on record, the present case would fall under Section 354 of IPC.

8. I have already observed that the present case would fall under Section 354 of IPC, which leaves only one other question to be answered i.e. regarding the sentence. At this stage, the learned advocate for the appellant has submitted that the incident had occurred in 1992 i.e. more than 12 years ago, the family members of the appellant are dependent on him. It is further stated that the appellant had left the place where he was earlier residing and he is residing at a place which is far away. The learned advocate has prayed that the sentence imposed on the appellant to be reduced to the period already undergone by him. Looking to the fact that the provisions of offence under Section 354 are attracted, the maximum punishment for which is two years and looking to the fact that the appellant has undergone almost nine months of imprisonment, I am inclined to reduce the sentence of imprisonment to the period of imprisonment undergone by the appellant. However, the sentence of fine is maintained.

9. In view of the above, the judgment and order of conviction for the offence under Section 376 read with Section 511 of IPC recorded by the learned IInd Addl. Sessions Judge Thane in Sessions Case No.324 of 1993 is set aside. Instead, the appellant is convicted for the offence under Section 354 of IPC and he is sentenced to R.I. for the period already undergone by him. The judgment and order of imposing fine amount of Rs.1000/- against the appellant, is confirmed. The appellant is on bail. His bail bonds shall stand cancelled.

. The appeal is partly allowed in the above terms.

[V.K.TAHILRAMANI.J]